GAN THING PHING

v.

ONG GEK KIM (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[ORIGINATING SUMMONS NO: S2-24-105-1997]
29 SEPTEMBER 1998

CIVIL PROCEDURE: *Affidavits - Defective affidavits in application for extension of private caveat - Affidavits not properly intituled - Whether defective - Rules of the High Court 1980, O. 41 r. 1(1)*

CIVIL PROCEDURE: *Affidavits - Defective affidavits in application for extension of private caveat - Absence of jurat in affidavits - Whether defective - Rules of the High Court 1980, O. 41 r. 1(7), (8), Form 78*

CIVIL PROCEDURE: *Affidavits - Defective affidavits in application for extension of private caveat - Affidavits neither affirmed nor sworn - Whether defective*

CIVIL PROCEDURE: *Affidavits - Refiling - Refiling to rectify defective affidavits - Whether leave of court required - Rules of the High Court 1980, O. 92 r. 4*

The plaintiff who won a RM2 million lottery contended that his brother had cheated him of the said sum. The plaintiff also contended that the defendant (his brother's wife) and his brother had utilised part of that money to pay for the purchase of a piece of land ("the land"). The dispute between the plaintiff and the defendant resulted in the plaintiff entering a caveat over a piece of land belonging to the defendant. After such caveat was removed by the Registrar, the plaintiff had obtained a court order expunging the cancellation of the private caveat from the Land Registrar and that the said caveat be reinstated pending disposal of the civil suit between the parties.

The present application by the plaintiff is for the extension of the private caveat pursuant to s. 326 of the National Land Code 1965. The defendant had applied to strike out this application but had failed, resulting in the defendant appealing to the Court of Appeal.

The defendant objected to the application on the grounds that:

(a) the affidavits were not properly intituled;

(b) there was no jurat;

(c) they were not affirmed before the commissioner.

To remedy those defects, the plaintiff filed three fresh affidavits but the defendant objected saying that the plaintiff ought to have applied for leave of the court before filing those affidavits. The plaintiff argued that the defendant was estopped from raising those issues as she did not raise them in her earlier application to strike out this present application.

Held:

[1] Order 41 r. 1(1) of the Rules of the High Court 1980 ('RHC') provides that every affidavit sworn in a case or matter must be entitled in that cause or matter. In the present case, the main affidavit in support of the application did not comply with the rule relating to the filing of the affidavits since it did not have the title to the action. The affidavit, therefore, must be rejected and consequently the application dismissed as it was unsupported.

[2] Order 41 r. 1(7) and (8) RHC provides that the jurat must be completed and signed by the person before whom it was sworn, and that it must be one of the forms in Form 78. In cases where the person does not understand the language in which it was written, he should have the contents translated to him. In the present case, the affidavit was in Bahasa Malaysia while the plaintiff had signed in the Chinese language. The plaintiff therefore had not understood the contents of the affidavit. Furthermore, the jurat did not state that the contents of the affidavit had been translated to the plaintiff. The affidavits therefore ought to have been disregarded.

[3] An affidavit must either be sworn or affirmed. In the present case, the word used was "ditandatangani" and there was not a trace, in this word, of any semblance, affirmation or swearing.

[4] Order 92 r. 4 RHC gives the court inherent power to make any order as may be necessary to prevent injustice or to prevent an abuse of the powers of the court. The plaintiff, in refiling the affidavits ought to have applied to the court for such leave. Since he did not do so, all the affidavits filed subsequently with the intention of rectifying the defects were rejected.

[5] The plaintiff ought to have raised estoppel in his affidavit-in-reply instead of refiling the three fresh affidavits. By his own conduct the plaintiff had neutralised his plea of estoppel.

[Application dismissed with costs.]

Case(s) referred to:
Voon Mow Chen v. Menteri Dalam Negeri & Anor [1993] 2 AMR 38 ***(refd)***

Legislation referred to:
National Land Code 1965, s. 326
Rules of the High Court 1980, O. 41 rr. 1(1), (7), (8), 4, O. 92 r. 4

For the plaintiff - Charles Hector; M/s Wee Choo Keong & Faaiz
For the defendant - T Gunaseelan; M/s Gunaseelan & Assocs

Reported by Mariette Peters-Goh

JUDGMENT

RK Nathan J:

The plaintiff won the first prize of RM2,000,000 in the Pan Malaysian Big Sweep Sdn Bhd. He sought the assistance of his brother, Gan Chin Hock, to collect the said prize money and to deposit a sum of RM1.5 million in the name of his daughter, Gan Chye Thing, and for the remaining RM500,000 to be distributed in equal shares amongst his brothers and sisters. The plaintiff now contends that his brother has cheated him of the said sum and that having withdrawn the said sum his brother has absconded with the RM2,000,000. He sued his brother and has obtained an in default judgment against him.

Case For The Plaintiff

The plaintiff contends that the defendant who is his brother's wife, and his brother have utilised part of that money to pay for the purchase of a piece of land held under Geran No. H.S.(D) 10825, P.T. Lot No. 249, Mukim Ampang, Daerah Kuala Lumpur, with a 4-storey shop house therein and wherein a restaurant known as "Ruong Thai Restaurant" was carrying on business, with the defendant as the sole proprietor. The plaintiff entered a private caveat (No. Pers 4202/96) on the said land on 6 May 1996. The plaintiff has also obtained an order from this court on 3 March 1997 for the extension of the said caveat until the hearing and disposal of this originating summons. The plaintiff had served the draft order on the Registrar on 3 March 1997 but the said caveat was removed at about 9.45 a.m. on 3 March 97. However, on 18 April 1998 the plaintiff obtained an order from this court which in essence was an order that the removal or cancellation of the private caveat 4202/96 by the land administrator on 3 March 1997, be expunged from the Land Register and that the said caveat be re-instated in the said Land Registry until this originating summons and Civil Suit No. S4-22-04-95 be heard. The defendant has appealed against that decision of mine.

The Application

This originating summons prayed, *inter alia*, for the following orders, namely:

(a) That the said caveat 4202/96 be not set aside until the hearing of this action.

(b) That the said caveat be not set aside until the disposal of an action which the plaintiff would be filing against this defendant.

In effect this application is primarily for the extension of the private caveat pursuant to s. 326 of the National Land Code (NLC).

Defendant's Contention

In support of his application the plaintiff filed an affidavit encl. 2 and two other affidavits. In her reply the defendant raised objections to the said 3 affidavits and contended that they were defective in that:

(1) The affidavits were not properly intituled.

(2) That there was no jurat.

(3) That they were not affirmed before the commissioner.

After I had given directions for written submissions with the consent of parties, the defendant submitted that not only did the plaintiff file the written submission but also filed 3 fresh affidavits in a purported attempt to rectify the errors as pointed out by the defendant in respect of the plaintiff's 3 affidavits filed earlier. The contents of the latest 3 affidavits were identical to that of the earlier 3 filed. The defendant now takes the stand that the plaintiff ought to have obtained leave of the court before filing these 3 fresh affidavits.

The Plaintiff's Contention

The plaintiff argued that he had acted *bona fide* and with no intention of abusing the process of the court. He argued that an application for leave after directions for written submissions had been given, was not a requirement pursuant to the Rules of the High Court 1980 (the RHC). In any event, he argued that, if the defendant had wanted to file a reply she could well have done so, but instead, having chosen not to do so, she cannot now complain.

Court's Findings

Before I proceed to consider the law relating to this case, I have to consider the issues raised by the defendant in relation to the affidavits filed.

Non Intitulement Of The Affidavits

Order 41 r. 1(1) of the RHC provides that every affidavit sworn in a case or matter must be entitled in that cause or matter. It is obvious on perusal that encl. 2 which is the main affidavit in support of this application does not comply with the very first rule relating to the filing of affidavits since it does not have the title to the action. On this alone the affidavit must be rejected and since the application is thus unsupported it ought to have been dismissed.

No Jurat

The rules relating to the jurat are O. 41 r. 1(7) and (8). They read as follows:

> (7) Every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn.
>
> (8) A jurat must be in one of the forms in Form 78.

On a perusal of the affidavits earlier filed I note that the affidavit is in Bahasa, whereas the plaintiff has signed in the Chinese language. I am not satisfied that the plaintiff understood the contents of his affidavit. It is precisely for such cases that the Rules had specifically provided for 4 different variations of jurat under Form 78, namely 78(a)-(d). Para (d) reads:

> (d) To an affidavit by a person who does not understand English. Sworn (or affirmed) on the .. day of ... , 19 ... at ... through the interpretation of 9 ... (if the interpreter is not a Court Interpreter add the following:
>
> 'the said ... having been first sworn that he had truly, distinctly, and audible translated the contents of his affidavit to the deponent ... and that he would truly and faithfully interpret the oath (or affirmation) about to be administered unto him the said ... ').
>
> Before me
> ...
> Commissioner for Oaths

In this case the word "English" should read "Bahasa Melayu". The jurat does not state that the plaintiff has been translated the contents of his affidavit. Besides, the Commissioner of Oaths is one Edwin D'Cruz. I do not know if he himself understood the Chinese language. On this absence of the jurat too, the affidavits ought to have been disregarded and consequently the application ought to have failed.

No Affirmation But Signing

The affidavits earlier filed show that they were neither sworn nor affirmed; but they were merely signed **(ditandatangani oleh)**. It is trite law that an affidavit must either be sworn or affirmed. In *Voon Mow Chen v. Menteri*

Dalam Negeri & Anor [1993] 2 AMR 38 Vincent Ng JC (as he then was) held that even the use of the word "diakui" or "diperakui" was not permissible in the jurat of an affidavit and thus he held the said affidavit as defective. In the present case the word used is **"ditandatangani"**. There is not a trace in this word of any semblance of affirmation or swearing. On this issue too the affidavits ought to have been rejected and the application ought to have failed.

Refiling Of The Affidavits

The plaintiff admits in his submission that in order to remedy these defects he refiled the said affidavits again on 11 August 1998 and served them with his submission. The plaintiff relied on O. 41 r. 4 of the RHC. It reads:

> 4. An affidavit may, with the leave of the Court, be filed or used in evidence notwithstanding any irregularity in the form thereof.

It is obvious that the plaintiff can obtain the leave of the court if he intended to use an affidavit irregular in form. To my mind the last 2 defects shown in these affidavits cannot be termed as irregular. These defects affect the very root of the affidavit. They are neither sworn nor affirmed nor do they show by way of the jurat if the contents were understood by the plaintiff. These defects are material defects and are not mere irregularities. Therefore O. 41 r. 4 of the RHC will not apply to the last two defects at least.

The plaintiff could have however applied to this court for leave pursuant to O. 92 r. 4 of the RHC which gives the court the inherent power to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. If such an application had been made even on the day directions for submissions were given, this court would have entertained such an application. Instead the plaintiff chose to act on his own. I therefore hold that all affidavits filed subsequently with the intention of rectifying the defects existing in the earlier affidavits, must be rejected as having been filed without the leave of this court.

Waiver

The plaintiff also pointed out that the defendant had applied to strike out this application and that I had given a judgment on 18 April 1998, dismissing the defendant's application against which the defendant had since filed an appeal to the Court of Appeal. The plaintiff also argued that since in that application the defendant had failed to raise these same issues in respect of the affidavits, she was now estopped from doing so. This argument seemed attractive and I would have given credence to it if the plaintiff had not by his own conduct

denied himself of the plea of estoppel. The plaintiff ought to have raised estoppel in his affidavit in reply and ought not to have rushed in panic to have refiled the 3 affidavits rectifying the earlier errors. By his own conduct, the plaintiff had neutralised his plea of estoppel; so when the defendant raises the issues afresh, I will have to consider them afresh.

Another issue raised by the defence and which I have to consider, is the fact that the plaintiff had also filed another suit in this court S2-22-88-97 which I had struck out on 23 July 1998. The said suit which was for the refund of the RM2 million with interest was in fact commenced after this originating summons had been filed. The issues and parties were the same except that the daughter of the plaintiff was the additional plaintiff. There was no appeal filed against the order of dismissal. However, the plaintiff had stated in the present affidavits that he has since filed a fresh suit. To my mind the plaintiff therefore, is not bereft of the remedy he is seeking by way of this originating summons. But this application must fail on the preliminary issue itself.

The plaintiff argued that the defendant ought to have given notice and should only argue on this issue rather than submitting on this as well as the entire issue. It is my judgment that there is no valid ground for the plaintiff to cry foul. The defendant has raised all these issues in her affidavit. Yet the plaintiff proceeded on. The defendant is therefore entitled to take all issues at the full hearing of the originating summons.

In any case I have not considered the merits. This application stands dismissed with costs.